TONG TIONG KIM

v.

PENTADBIR TANAH DAERAH JOHOR BAHRU & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J.
[ORIGINATING MOTION NO. 25-29-1991]
9 SEPTEMBER 1994

LAND LAW: Land Administrator's right of way - Enquiry - Applicant given access through respondent's land - Reopening of enquiry -Whether valid - Second enquiry established availability of alternative path - Whether inexpedient for first order to continue to exist - Special circumstances - Whether existed - Extinguishing of first order - Whether proper - National Land Code 1965 ss. 33, 34(1) & (2) (a), 390, 395(1), 418.

The applicant, the occupier of that piece of land known as Lot 603, applied for a Land Administrator's right of way through the second respondent's land under s. 390 National Land Code (NLC). An enquiry was held by an Assistant Land Administrator and pursuant to that an order giving the applicant the said access was issued. The second respondent objected to the order on the ground that access was available through Lot 603 and as such there was no necessity for access through her land. As a result another Assistant Land Administrator proceeded to conduct a second enquiry and after having satisfied that an alternative route as alleged in fact existed, extinguished the order made in the first enquiry on the ground that it was inexpedient for that order to continue to exist.

The applicant applied to the High Court to reverse the second order aforesaid. Before the learned Judge the primary issue that arose was whether the second Assistant Land Administrator was empowered to conduct the second enquiry herein, and if so, whether, in ruling the way he did, he had exercised his discretion correctly bearing in mind the provisions of ss. 33, 34 and 395 NLC.

Held:

[1] It seems clear that at the first enquiry , the evidence of the availability of access to the applicant through Lot 603 was not disclosed. A question hence arises as to whether the fresh evidence as envisaged by s. 34(2)(a) NLC could, by the exercise of reasonable diligence, have been produced at the first enquiry. In the context of what transpired in this case, where, during the first enquiry, the second respondent was prepared to allow access on certain terms and conditions, and which terms and conditions the applicant had failed to agree to, the disclosure of the access already existed for the applicant did not arise, and similarly the exercise of reasonable diligence to produce such evidence at the first enquiry.

[2] The second respondent in this case is not caught by the proviso to s. 34(1) of NLC. In the premises, the second Assistant Land Administrator, having regard to the fresh evidence, that is, the availability of access through Lot 603 by the applicant and further no exceptional circumstances exist, had exercised his discretion correctly to hold that it is no longer expedient for the first order to continue to exist

and should therefore be extinguished. Even though he had not complied with s. 34(3) by not recording briefly his reasons for re-opening the enquiry, such requirement is only directory and not mandatory.

[Application dismissed. Order of second Land Administrator affirmed].

Case referred to:
Si Rusa Inn Sdn. Bhd. & Ors. v. The Collector of Land Revenue, Port Dickson & Ors. *[1987] 1 MLJ 147 / [1986] 1 CLJ 584* ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 33, 34 (1) (2) (a), 390, 395 (1), 418

For the plaintiff - Badrul Hisham; M/s. Shahinuddin & Ranjit.
For the 1st respondent - A Rashid; Pejabat Penasihat Undang-Undang Negeri Johor.
For the 2nd respondent - Serene S. Ong; M/s. L. M. Ong & Co.

JUDGMENT

Haidar bin Mohd Noor J:
Tong Tiong Lim, the applicant/appellant ('the applicant'), filed this originating motion on 13 November, 1991 pursuant to s. 418 of the National Land Code, 1965 ('NLC') seeking:

(1) to validate the order of the Assistant Land Administrator dated 29 December 1990, ("first order").

(2) the first respondent (Pentadbir Tanah Daerah, Johor Bahru) to comply with the first order

(3) the order of the Assistant Land Administrator dated 20 February 1991 (second order) be set aside and cancelled forthwith as it was null and void,

(4) Costs to be paid by the first respondent and/or the second respondent.

Various grounds were set out in the originating motion. A number of affidavits were filed by the parties apart from the oral evidence of the Assistant Land Administrator (SP1) who held the enquiry on 23 October 1990.

Facts

According to the applicant, his family resided at No. 2B, Jalan Stulang Darat, 80300 Johor Bahru for about 40 years. He and his family had been using the access (footpath) along Lot 2775 Bandar Johor Bahru grant No. 27822 ('the said lot') from the previous owner, Encik Othman by paying rent of RM100 a year. A receipt (exhibit 'TTL-1') was produced in support. Subsequently, the said lot was ·sold to the second respondent who thereafter stopped the access to the applicant unless he agrees to an increase in the yearly rental of RM350 in addition to the compensation of RM6,000. However, I would like to point out here that the applicant was in error when he said that the previous registered owner of the said lot was one Othman. A perusal of the grant of the said lot (exhibit 'R-1') clearly showed that the previous registered owner was one Abdullah bin Hj. Mohd. Said. The receipt (exhibit 'TTL-1') would appear to have been issued by the father of the second respondent as the name seems to indicate. However, the second respondent in her affidavit in reply (encl. 7) did not touch on exhibit TTL-1. In paragraph 2(d) of her affidavit (encl. 7) the second respondent, on the application of the applicant agreed to offer to the applicant access over her said lot subject to payments as suggested by her. However, the applicant refused to accept her offer and the second respondent then withdrew her offer.

The applicant, on the advice of his lawyer, made an application for the Land Administrator's right of way under s. 390 of NLC (see exhibit 'TTL-2'). As a result a notice was issued a on 14 October 1990 (exhibit 'TTL-3') for an enquiry to be held on 14 October 1990 (the first enquiry'). The first enquiry was held by Mohd. Naim bin Nasir, Assistant Land Administrator, District of Johor Bahru ('first Assistant Land Administrator') and the second respondent, her husband, Encik Tong Hak Ni (registered owner of part of Lot 603), the applicant and his lawyer were present at the first enquiry.

According to paragraph 9 of his affidavit (encl. ,2), the applicant deposed that the second respondent objected to his application on the ground that the Land Administrator's right of way should not be given on the said lot as access could be given on Lot 603 itself. With respect, this is not true as from the record of the enquiry (exhibit 'TTL-14') it could be seen that such evidence was not recorded in the enquiry proceedings. From TTL - 14 it would seem clear to me that there was a discussion between the applicant and the second respondent in respect of the access of the applicant and the second respondent stated certain terms to be met by the applicant. The applicant could not agree but was prepared to discuss them. The first enquiry was adjourned. I must say here that the recording of the enquiry held by the first Assistant Land Administrator was far from satisfactory. In his oral evidence (page 8 of the notes of evidence) he explained that the word 'keputusan' should read 'kenyataan pohon' and he further said that the first enquiry was adjourned for a decision and not for the parties to have a discussion. Subsequently, on 29 December 1990 he made the first order giving access to the applicant subject to certain terms (see exhibit 'TTL-4'). Thereafter, he issued a letter dated 31 December 1990 (exhibit 'TTL-5') to the second respondent enclosing a copy of the first order and asking the second respondent to take appropriate action accordingly.

On the receipt of TTL-5, the second respondent objected to the first order made by the first Assistant Land Administrator by way of a letter dated 13 January 1991 ('TTL-7') setting out the grounds thereon. In essence, she said that the applicant has access through Lot 603 and therefore there was no necessity for access through her land (see also paragraph 2(e), (f) and (d) of her affidavits at encl. 6).

As a result of her objective, Mohd. Azman bin Mohd. Ali, the Assistant Land Administrator ('the second Assistant Land Administrator') proceeded to have another enquiry ('the second enquiry') pursuant to s. 395 (1) (b) of NLC read with s. 35.

In his affidavit dated 26 February 1992 the second Assistant Land Administrator gave his reasons at paragraph 7 as to why he conducted the second enquiry. The principal reason was that at the first enquiry no evidence was disclosed regarding the availability of access to the applicant through Lot 603. It is not true, however, for him .to say at paragraph 7(c) that the applicant or his lawyer did not object to the second enquiry to be held as clearly from the records of the second enquiry (exhibit 'TTL-15') it was recorded that Encik Badrul Hisham contended that he (the second Assistant Land Administrator) had no power to hold a second enquiry. Again I must say that the record of the second enquiry is far from satisfactory.

I could quite understand that as the District Land Office was cited as a party, the first Assistant Land Administrator was rather reluctant to give an affidavit in

support of the applicant. As a result an application was made by the applicant for the first Assistant Land Administrator to give oral evidence instead. I allowed the application.

From the oral evidence of the first Assistant Land Administrator (SP1) he admitted under cross examination by the Counsel for the second respondent that in the first enquiry the applicant did not disclose of an access available through Lot 603 towards the public road besides not stating his status in respect of his application before him. It would seem clear to me that the first enquiry was a 'rushed job' done by the first Assistant Land Administrator.

Law

Section 395(1) (b) of NLC gives the power to the Land Administrator to hold an enquiry and thereafter order the right of way already made to be extinguished if satisfied that it is inexpedient for it to continue to exist. s. 395(1) (b) of NLC reads:

> 395 (1) The Land Administrator, where he is of the opinion that:
>
> (a) ...
>
> (b) it is inexpedient that a Land Administrator's right of way should continue to exits,
>
> may hold an enquiry and thereafter order the right of way to be extinguished.

In any enquiry under NLC, s. 33 of NLC provides that a decision or order of the Land Administrator shall not be altered or added to except for the purpose of correcting verbal errors or remedying some accidental defect or omission not affecting a material part of the enquiry. However, s. 33 provides the special circumstances specified in s. 34 of NLC for the re-opening of enquiry. It is relevant therefore to quote s. 34 in full. Section 34 reads:

> 4. Re-opening of enquiry
>
> (1) In any of the circumstances specified in sub-section (2), a Land Administrator may re-open any enquiry held under this Act by himself or any predecessor in office and, where it appears to him just to do so, may vary or set aside any decision or order previously given or made therein.
>
> Provided that no enquiry shall be re-opened under this section,
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> (i) at any time after an appeal has been lodged therein as mentioned in s. 37, unless the appeal is subsequently withdrawn or,
>
> (ii) more than 3 years after the date on which any decision or order therein was first given or made.
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> (2) The said circumstances are as follows:
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> (a) where fresh evidence of a material nature is available, not being evidence, which could, by the exercise of reasonable diligence, have been produced at any earlier hearing;
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> (b) where any earlier hearing was conducted in the absence of any necessary or proper party whose absence was not due to any default or neglect on his part.
>
> (3) A Land Administrator shall record briefly his reasons for re-opening any enquiry under this section.

It would seem clear to me and beyond any dispute that at the first enquiry, the evidence of the availability of access to the applicant through Lot 603 was not disclosed. The issue is whether the fresh evidence as envisaged by s. 34(2) (a) of NLC could by the exercise of reasonable diligence have been produced at the first enquiry. In this context, I have to examine what transpired at the first enquiry. From the record of the first enquiry it would appear that the second respondent was prepared to allow access through her land by the applicant subject to certain terms. The terms apparently would not be reached by the parties and the Assistant Land Administrator proceeded to make the first order. In the circumstances, the disclosure of the access already existed for the applicant did not arise and similarly the exercise of reasonable diligence to produce such evidence at the first enquiry. As no agreement could be reached she was entitled to object to the applicant having access through her land as evidence shows that the applicant could have access through Lot 603.

The word 'expedient' was considered by Peh Swee Chin, J (as he then was) in *Si Rusa Inn Sdn. Bhd. 6 Ors. v. The Collector of Land Revenue Port Dickson & Ors.* [1987] 1 MLJ 147 where at page 152, his Lordship said:

> An authority that is conferred on a public official to grant a right of way against a landowner for the benefit of another has to be exercised (considering the combined effect of the passage cited from *Sri Lempah's* case and the deliberate use of the word "expedient" in the relevant section of the Code) for a proper purpose and reasonably unless exceptional circumstances exist.

In this case I am of the opinion that the second Assistant Land Administrator, having regard to the fresh evidence, that is, the availability of access through Lot 603 by the applicant and further no exceptional circumstances exist, had exercised his discretion correctly to hold that it is inexpedient for the first order to continue to exist and should therefore be extinguished.

As the second respondent is not caught by the proviso to s. 34(1) of NLC and having satisfied the circumstances set out in s. 34(2)(a) to be read with s. 395(1), the second Assistant Land Administrator is empowered under the NLC to hold the second enquiry and to set aside the first order. Even though it seems clear from the record of the second enquiry that the second Assistant Land Administrator had not complied with subsection (3) of s. 34 by not recording briefly his reasons for re-opening the second enquiry, I am of the view that such requirement is only directory and not mandatory. The failure to do so does not render the second enquiry null and void and vitiate second order made thereon. In the circumstances, the contention of the applicant that the second enquiry is null and void and the second Assistant Land Administrator being *functus officio* does not arise at all. The first respondent supported the second order made by the second Assistant Land Administrator. For the reasons set out by me I would dismiss this originating motion with costs and accordingly I affirm the second order made by the second Assistant Land Administrator.